Supreme Court, U.S.
FILED
JUL 10 1991
OFFICE OF THE CLERK

No. 90-6531

IN THE
**SUPREME COURT OF THE UNITED STATES**
OCTOBER TERM, 1991

KEITH J. HUDSON,

*Petitioner,*

v.

JACK McMILLIAN, MARVIN WOODS,
and ARTHUR MEZO,

*Respondents.*

**On Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit**

# BRIEF FOR HUMAN RIGHTS WATCH, *AMICUS CURIAE*, SUGGESTING REVERSAL

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# BRIEF FOR HUMAN RIGHTS WATCH, *AMICUS CURIAE*, SUGGESTING REVERSAL

This *amicus* brief is submitted, with the consent of counsel for all parties, on behalf of Human Rights Watch.

## THE INTEREST OF HUMAN RIGHTS WATCH AS *AMICUS CURIAE*

The interest of Human Rights Watch in suggesting reversal of the decision below stems from its role as the leading United States-based international human rights monitoring organization. Through its five regional divisions -- Africa Watch, Americas Watch, Asia Watch, Helsinki Watch, and Middle East Watch -- Human Rights Watch seeks to promote internationally recognized human rights by monitoring and reporting on, and thereby seeking to stigmatize, governmental violations in some 60 nations.

A major focus of Human Rights Watch's work is the prevention of torture and mistreatment of persons in official custody. Its researchers have examined prison conditions and the conduct of custodial officials in many countries including the United States. Human Rights Watch's organizational mission, informed by a detailed knowledge of the nature and extent of physically abusive conduct by officials in prisons throughout the world, leads it to be concerned with the outcome of this case -- an outcome that will send a powerful message about this country's position on what constitutes acceptable conduct towards people in custody.

## SUMMARY OF ARGUMENT

The United States Court of Appeals for the Fifth Circuit, in the decision under review, has adopted a constitutional standard that, if affirmed, would bare as hypocritical pieties decades of American proclamations about the right of every person, at home and abroad, to be free from violent, physical abuse by government officials. The court of appeals held that guards in an American prison may, consistent with our Bill of Rights, shackle their charges by the wrists and ankles, hold them from behind, and then hit them repeatedly in the face, loosening teeth, breaking dental plates, and splitting lips, and kick them in the buttocks -- all while supervising officers stand by commenting, "Don't have too much fun." To state the rule is to refute its compatibility with the Eighth Amendment.

The United States consistently has admonished other nations that the conduct found by the court below to be constitutionally



permissible in a Louisiana prison is an intolerable affront to human rights in the international arena. The lower court's application in this case of the superficially unprepossessing "significant injury" prong of a four-part Eighth Amendment test denies a generation of work by international organizations showing that, through the practiced use of rubber hoses and truncheons, electric shock to genitals, near asphyxiation or drowning, cigarette burns -- and, as here, naked fists and booted feet -- terrible suffering can be inflicted in a single instance that leaves no lasting physical injury requiring medical treatment (forgetting altogether, as does the court below, the psyche).

In this brief, Human Rights Watch, *amicus curiae*, suggests reversal of the decision under review. We here recall for the Court's consideration (1) the conventions and international agreements reflecting the United States government's position that the conduct at bar breaches international norms of civilized conduct; and (2) the published authorities recognizing that what was done to the petitioner in this case is unacceptable abuse, not "insignificant injury."

The proposition we assert is straightforward: unless this Court repudiates the "significant injury" standard as applied below, years of struggle in the field of international human rights will be eviscerated. The world will see that what our government preaches abroad is ignored at home; that our Bill of Rights, on its 200th birthday, provides less protection against physical cruelty than our own government urges as a minimum standard of conduct in the most oppressive dictatorships operating in the world today.

## ARGUMENT

### I. THE "SIGNIFICANT INJURY" STANDARD CONFLICTS WITH OUR INTERNATIONAL OBLIGATIONS AND WITH OUR GOVERNMENT'S EXPLICIT CONDEMNATION OF PHYSICAL ABUSE BY CUSTODIAL OFFICIALS

The United States has long exercised moral leadership in the international community aimed at eradicating both torture and less egregious forms of abuse by custodial officials. Through its membership in the United Nations, its adherence to treaties, and the work of its State Department, the United States has vigorously denounced inhuman treatment of prisoners wherever and whenever it occurs. In so doing, our government has recognized repeatedly that cruel and inhuman treatment is defined in terms of the wantonness of the abuse and not the significance of the resulting injury.

#### A. "Significant Injury" Forms No Part of Any Internationally Recognized Test for Defining Cruel and Inhuman Punishment

The unnecessary and violent assault of prisoners -- what happened to the petitioner in this case -- is the sort of punishment that the United States (and many other nations) has condemned in the international arena for decades. A network of treaties and conventions, as well as United Nations declarations, resolutions and rules, uniformly affirm that cruel and inhuman treatment of prisoners is unacceptable. Not one of these authorities contains, or has been construed to contain, a "significant injury" exception of the sort fashioned by the Fifth Circuit in this case. Although the citations can be multiplied, it perhaps suffices to recall the relevant United Nations documents and our government's recent adherence to the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

Starting in 1948, in Article 5 of the *Universal Declaration of Human Rights*, and again in 1966, in Article 7 of the *International Covenant on Civil and Political Rights*, the United Nations unequivocally proclaimed the right of every individual to be free



from excessive punishment: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." *See Universal Declaration of Human Rights*, art. 5, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948); *International Covenant on Civil and Political Rights*, art. 7, G.A. Res. 2200 A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) (effective May 23, 1976). In 1975, through the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, the United Nation's General Assembly once again condemned torture and cruel and inhuman punishment. *See* art. 2, G.A. Res. 3452 (XXX), 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975). In addition, the United Nations has declared specifically that the beating of prisoners breaches minimum acceptable standards of conduct. *See Standard Minimum Rules for the Treatment of Prisoners*, art. 31, U.N. Doc. A/Conf.6/1 Annex I (1957), *reprinted in* United Nations, *Human Rights: A Compilation of International Instruments* 190, 196 (1988) ("Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishment for disciplinary offenses").[1/]

Most recently, in 1984, the United Nations unanimously adopted the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (hereafter "the *Convention*"). G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 16) at 197 (1984) (entered into force June 26, 1987). By signing the *Convention* in 1988, the United States affirmed its role as a leader

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[1/] The European Community as well as North and South American and African nations, independent of the United Nations, also have condemned the wanton abuse of people in official custody. *See Convention for the Protection of Human Rights and Fundamental Freedoms*, art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 (effective Sept. 3, 1952); *American Convention on Human Rights*, art. 5, Nov. 22, 1969, 36 O.A.S.T.S. 1 (effective July 18, 1978); *African Charter on Human and Peoples' Rights*, art. 5, June 1981, OAU Doc. CAB/LEG/67/3/Rev. 5 (effective Oct. 21, 1986).

in the fight for basic human rights.[2] The *Convention*, in addition to establishing a regime for international cooperation in the criminal prosecution of torturers,[3] requires its signatories, pursuant to Article 16, to prevent within their own boundaries other acts "[o]f cruel, inhuman or degrading treatment or punishment which do not amount to torture".[4]

In ratifying the *Convention*, the Senate specified in a reservation that Article 16 would be interpreted as being co-extensive with the Eighth Amendment's ban on cruel and unusual punishment. At the hearings on ratification, the State Department's Legal Adviser, Abraham Sofaer, noted this reservation and testified, "Our courts have interpreted this [Eighth Amendment] prohibition to protect against a broad range of practices that involve the *unnecessary and wanton infliction of pain*." *See Convention Against Torture: Hearings Before the Senate Committee on Foreign Relations*, 101st Cong., 2d Sess. 11 (1990) (statement of Abraham Sofaer, Legal Adviser, Dep't of State) (emphasis added). At no point in the course of the hearings did any State Department representative (or anyone else) suggest that, absent "significant injury," there could be no violation of Article 16. On the contrary,

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[2] The United States signed the Convention in 1988 and it was ratified by the Senate in October 1990. *See* Leich, *Contemporary Practice of the United States Relating to International Law*, 85 Am. J. Int'l L. 334, 335 (1991). At this writing, the ratification papers have not yet been deposited with the United Nations – a formality of no substantive importance.

[3] Article 1 defines torture as follows:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

*Convention*, *supra*, art. 1.

[4] Under the *Convention*, the United States must ensure that law enforcement personnel are instructed that such cruel and inhuman punishment is prohibited, *id.*, art. 3, and that competent authorities conduct a prompt and impartial investigation if there are reasonable grounds to believe that a violation has been committed, *id.*, arts. 12 and 13.



as noted, the stress was put on the "unnecessary and wanton" nature of the act -- elements that indisputably are present on the record at bar.

In summary, "significant injury," as that term was applied by the Fifth Circuit in this case, forms no part of the definition of unacceptable punishment under the international conventions, resolutions, and rules discussed above. Likewise, it should form no part of Eighth Amendment jurisprudence in this country.

### B. The State Department Regularly Condemns Conduct by Custodial Officials Abroad That Causes No "Significant Injury"

In addition to the United States's international commitments, Congress has enlisted the State Department to monitor incidents of torture and other cruel, inhuman, or degrading treatment or punishment that take place abroad. The State Department publishes the results of its efforts annually in *Country Reports on Human Rights Practices* (hereafter the "*Country Reports*") that are submitted to Congress in compliance with sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961, as amended, *see* 22 U.S.C. §§ 2151n(d), 2304(b) (1988).

These reports, which "unashamedly reflect[] the U.S. view," *Country Reports* x (1990), demonstrate the leadership role that the United States seeks to play in the battle against intentional acts of physical abuse by custodial officials. *See id.* at xi (the *Country Reports*, by giving "continuous and well-publicized attention to human rights, ha[ve] contributed to the strengthening of an international human rights agenda"). The incidents described in the *Country Reports* are included for the specific purpose of serving as examples of "Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment." *See, e.g., id. passim*. Accordingly, the nature of the incidents provides reliable guidance as to the standards used by our government in assessing what is and what is not acceptable conduct by custodial officials.

In Point II of this brief, we set forth a number of examples drawn from the *Country Reports*. They make it clear that, in contrast to the Fifth Circuit's standard, the State Department's definition of cruel and inhuman treatment does not require a "significant injury." This conclusion is confirmed by written

instructions that the State Department has furnished to our embassies in connection with the compilation of the 1990 *Country Reports*:

> The abuse of psychiatry . . . is a form of cruel, inhuman or degrading treatment or punishment and may constitute torture depending on its severity. . . . Police beatings of criminals, inhumane prison conditions, or violence by police or military personnel which is permitted because of poor supervision, improper training, or indifference to individual behavior, fit clearly into the 'cruel' category.

Copy of instructions provided by Thomas E. Williams, Director of Country Reports Team of United States Dep't of State to Kenneth Roth, Deputy Director of Human Rights Watch (July 8, 1991) (available in Human Rights Watch files).

These instructions, together with the examples set forth below, make explicit what in any civilized nation should go without saying: it is a breach of the ban against cruel and unusual punishment to inflict pain unnecessarily and wantonly on a helpless prisoner. The coincidence that such pain was inflicted by means of a technique that, whether by design or by chance, produced no injury requiring medical treatment does not change the result. Such a coincidence must surely be irrelevant to any modern Eighth Amendment analysis.

Unless the decision below is reversed, a standard will have been set in this country that provides less protection against wanton brutality than that which our government has long urged upon the rest of the world as a minimum standard of decency and civilized conduct. Such an anomaly would constitute a severe setback in the fight for human rights.



## II. THE "SIGNIFICANT INJURY" STANDARD AS APPLIED BELOW SANCTIONS INTOLERABLE PHYSICAL AND PSYCHOLOGICAL ABUSE

The Fifth Circuit's "significant injury" requirement, read against the factual backdrop of this case, opens too wide a door. It fails to recognize that terrible pain can be caused by techniques that leave no physical mark, that produce no medically treatable condition, and that can be administered in a single incident. It fails to recognize also that conduct giving rise to severe psychological damage can be inflicted in a single incident that produces no injury requiring medical treatment. The documented examples of such incidents are legion. They include the following:

— In Northern Ireland, British security forces subjected IRA members to "interrogation in depth" with techniques that included forcing detainees to remain spreadeagled against the wall, with the fingers bearing the weight of the body; hooding of the detainees; subjection to noise; and deprivation of food and drink. The European Court of Human Rights held that these practices constituted inhuman treatment. *See Ireland* v. *United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978).

— In Mexico, "[m]ethods range from beatings to death threats and other forms of psychological intimidation to sophisticated torture techniques designed to leave no lasting physical marks." Americas Watch, *Human Rights in Mexico: A Policy of Impunity* 9 (1990).

— In Nicaragua, beatings were administered with rubber instruments, or boxing gloves, or sticks wrapped in towels -- "to avoid marks." *Country Reports* 620 (1985). There was also the case of Sofonias Cisneros who was stripped naked, handcuffed, kicked and beaten against a wall, and had a pistol placed against his temple -- none of which resulted in "significant injury" as applied by the Fifth Circuit. The State Department characterized this conduct as "torture," and not merely as "cruel, inhuman and degrading" treatment. *See* U.S. Dep't of State, *Human Rights in Nicaragua under the Sandinistas: From Revolution to Repression* 25-26 (1986).

— In Brazil, interrogations were accompanied by physical abuse designed to leave no physical trace; one army instruction document states: "press hard *without* leaving marks." *Torture*

*in Brazil: A Report by the Archdiocese of Sao Paulo* 180 (J. Dassin ed. 1986).

— From Czechoslovakia, there was this report: "One inmate saw some very severe beatings, which were done in a way to leave no marks: the prisoner was wrapped in a wet sheet and then beaten with clubs and fists." Helsinki Watch, *Prison Conditions in Czechoslovakia* 11 (1989), *cited in Country Reports* 1124 (1990).

These examples are drawn from an extensive literature aimed at publicizing, and thereby stigmatizing, clear examples of human rights abuses.[2/] The conduct they depict is condemned as

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[2/] *See, e.g.*, Amnesty Int'l, *Torture in the Eighties* 144 (1984) (in Argentina, "[t]he most common methods of torture . . . were the following: electric shocks applied to all parts of the body with the *picana electrica* (electric cattle prod); '*submarino*': immersion in water with the head covered by a cloth hood--when this becomes wet, it sticks to the nose and mouth and when the victim is taken out of the water breathing is practically impossible; beatings with fists, truncheons, rifle butts and sticks; kicks; cigarette burns; plunging victims into ice cold baths; keeping victims hooded; forcing prisoners to stand in awkward positions for hours; depriving prisoners of food, drink and sleep"); *id.* at 151 (in Chile, most common physical torture included beatings and administration of electric shocks); *id.* at 153 (in Colombia, "[t]he range of techniques of torture included: systematic beatings; near drowning; near asphyxiation; electric shocks; sexual abuse; the use of drugs to induce pain or disorientation; enforced standing; deprivation of sleep, food and sometimes water; exposure to sun or rain or cold; and suspension by the arms while bound or handcuffed behind the back"); *id.* at 171 (in Peru, "[p]risoners were stripped naked during interrogation, regularly drenched with cold water, and systematically beaten with leather or fabric implements filled with sand"); *Implementation of the Helsinki Accords: Hearings Before the Commission on Security and Cooperation in Europe*, 101st Cong., 1st Sess. 12 (1989) (testimony of Darrel Regier, M.D., Director of Division of Clinical Research, National Institute of Mental Health) (detailing abuses of psychiatry in Soviet Union, including high levels of medicine used to treat "delusions of reformism" and sulfazine treatment for punitive purposes); *Country Reports* 519 (1988) (in Cuba, beatings with rubber hoses and fists); *Country Reports* 443 (1987) (in Cuba, prisoners placed in refrigerated cold-storage rooms; stuck with needles); U.S. Dep't of State, *Human Rights in Nicaragua under the Sandinistas: From Revolution to Repression* 26-27 (1986) (political leader's glasses were taken away and he was given newspaper that purportedly had front-page account of his parents' deaths); *Country Reports* 621 (1985) (in Nicaragua, prisoners placed in sealed cars in direct sunlight until they dehydrate); *Country Reports* 667 (1990) (in Honduras, suffocation through use of hood placed over head); *Country Reports*

(continued...)



unacceptable by, among others, our own Department of State. Yet the beating administered to the petitioner at bar — a beating that is indistinguishable from many of the incidents described in the sources cited above — has been dismissed as insufficiently severe to warrant redress under the Eighth Amendment. Such a result cannot stand.

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[2/](...continued)
1357 (1988) (in Iraq, "[t]he security forces' methods of torture . . . reportedly include beatings with fists and rubber truncheons, electrical shocks to the genitals and other parts of the body, and the extraction of fingernails and toenails, as well as psychological torture"); *Country Reports* 717 (1990) (in Panama, "police on occasion gratuitously punched and hit detainees in the course of arrest"); *Country Reports* 989 (1987) (in Poland, "detainees have lodged complaints that policeman repeatedly banged their heads against concrete floors or metal arm rails or kicked them in the face and genitals"); Neier, *Watching Rights*, 251 The Nation 723 (1990) (reporting that deputy police chief applies electric cattle prod to genitals); *see also Country Reports* 359 (South Africa), 611 (El Salvador), 930 (Korea), 953 (Malaysia), 1429 (India), 1445 (Iran), 1479 (Israel), 1587 (Pakistan) (1990).

## CONCLUSION

For the reasons set forth above, Human Rights Watch suggests that the decision below should be reversed.

Dated: New York, New York
July 10, 1991

Respectfully submitted,

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[g] This brief was prepared with the assistance of Jonathan Galst and Lynn Oberlander who are not yet members of the bar.